Filed 2/27/19 P. v. Correa CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANGELO CORREA, Defendant and Appellant.	B280758 (Los Angeles County Super. Ct. No. BA420480)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Angelo Correa of first degree murder with premeditation and deliberation (Pen. Code, § 187, subd. (a)),[1] and found true an allegation that he personally used a dangerous and deadly weapon (§ 12022, subd. (b)(1)). The trial court sentenced him to prison for a term of 26 years to life.

Defendant contends: (1) the evidence was insufficient to support the finding that he acted with premeditation and deliberation; (2) the court erred by refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense and subjective provocation; (3) his counsel was constitutionally deficient by failing to object to the prosecution's use of still images taken from a video recording of the incident; and (4) he was denied his right to represent himself at trial. We reject these arguments and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

While riding on a Los Angeles Metro train, defendant stabbed Jose Velasco once in the neck with a knife, cutting Velasco's carotid artery and jugular vein. Velasco died as a result.

Three passengers on the train testified about the incident. Daniel K. testified that he was waiting at the North Hollywood Metro station for a train at about 9:00 in the morning on January 13, 2014. Defendant arrived in the station, singing loudly and behaving "aggressively" by "getting close" to others and "sing[ing] loudly in their face[s]," then "backing away."

Daniel K. and defendant entered the same car of a Metro train. Daniel K. sat at the back of the car facing forward; defendant sat near the front of the car facing the back. After several stops, defendant got up and walked toward the back of the car. When he

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

reached the middle of the car, he turned around and appeared to "shove" a man as if he wanted the man to back away. Prior to the shove, Daniel K. had not seen the recipient of the shove make any movement or say anything. Defendant then turned and ran out the door located about seven feet away from Daniel K. As he ran, defendant folded "a tactical style knife" and put it in his pocket. Daniel K. then saw Velasco, the man who defendant had appeared to shove, bleeding from his neck.

Alex S. testified that he boarded the Metro train at the North Hollywood station and sat in the seat behind defendant. Defendant was singing, or "rapping," loudly and hitting the back of his seat with his hand. Defendant then stood up and paced in the aisle, rapping, and walking close to others "in a very aggressive manner." Some passengers did not respond to his behavior, while others glanced at him and moved away. Alex S. watched defendant "disappear[] into a crowd of people." As the train pulled into the Vermont/Santa Monica station, Alex S. heard "a collective gasp from the crowd." He then observed a commotion and saw "the victim" holding a cloth against his throat and "blood all around."

S.H. testified that she was sitting behind Velasco near the middle of the car next to the aisle, facing forward. Around the time the train reached the Vermont/Santa Monica station, S.H., who had been playing a game on her cellular phone, noticed defendant standing next to her. She saw defendant "pull[] out a knife" and face Velasco, who was then standing in the aisle. The two men appeared to be "sort of sizing each other up a little bit." Velasco's hands were empty and at his sides, and he did not raise them at any point. S.H. did not hear any words exchanged between the two, but did hear someone in the vicinity say, "What? What? What?" Defendant then stabbed Velasco and ran out the door.

The Metro train car was equipped with at least three video cameras that recorded the incident from different positions. The cameras did not record audio. The recording relied upon by the prosecution, from camera four, shows a portion of the car from approximately its middle to the rear of the car. The car is crowded, with some passengers standing in the aisle near the rear door. Defendant appears within the camera's view near the middle of the car as the train pulled into a station. He sidesteps toward the rear of the car while looking toward the front as he pulls something from his pants pocket. Defendant briefly handles the object with both hands, then holds it in his right hand, which drops to his side. Defendant shifts his stance to square his body with the direction he is looking and appears to say something to someone located outside the camera's range of view. (Velasco cannot be seen in the video.) He takes one or two steps forward and thrusts his right arm forward to a point beyond the view of the camera. He turns and runs out the open car door into the station.

According to a running timestamp embedded in the video recording, about four seconds elapsed from the moment defendant reached into his pocket to the time he lunged toward his victim.

In addition to the video recording, the court admitted into evidence, without objection, seven still photographs reproduced from the video and a detective's testimony about the photographs.

A medical examiner testified that Velasco had 0.03 micrograms of methamphetamine in his system at the time. He described this amount as "a low level." Methamphetamine, he explained, is a stimulant and a hallucinogen. As a stimulant, the substance could make the user appear to others as "hyperactive." The hallucinogenic effect may cause one to "sense something or create something in their mind that's not really there," and to react to a situation that is not real.

A forensic video analyst testified for the defense regarding video recordings from three cameras on the train car, including the camera four video introduced by the prosecution. The video quality of the two recordings that were not introduced by the prosecution is less clear than the camera four video. According to the video analyst, they appear to show a person near defendant standing up just before the attack.

Defendant did not testify.

DISCUSSION

A. *Sufficiency of the Evidence of Premeditation and Deliberation*

Defendant challenges the sufficiency of the evidence supporting the jury's finding that he committed the murder of Velasco with premeditation and deliberation. We reject the argument.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187.) First degree murder includes murder that is willful, deliberate, and premeditated. (§ 189.) A murder is " 'premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' " (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) The requisite thought and reflection " ' "does not require an extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.)

In evaluating the sufficiency of evidence to support the challenged findings, we consider the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a rationale trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 577; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1068–1069.) Substantial evidence includes reasonable inferences that may be drawn from circumstantial evidence. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1070; *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1152.) " ' " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " ' " (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Here, defendant walked into a Metro station during the rush hour commute carrying in his pocket what one witness described as a "tactical knife." While in the station, he behaved aggressively toward others by "sing[ing] loudly in their face[s]," then backing away. He continued this behavior on the Metro train by hitting his seat and walking through the car rapping close to others. He then stabbed a person who, it appears, merely stood up and faced defendant. From these actions, jurors could reasonably infer that defendant entered the Metro station and the train car with a preconceived plan to provoke a confrontation with another to which he would respond by stabbing the other with his knife. (See *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [evidence of planning combined with a "particular and exacting" manner of killing supports a finding of premeditation and deliberation].)

Even if defendant did not plan to kill when he entered the Metro train, his actions immediately preceding the attack imply the rapid development of thoughts leading to the requisite calculated judgment. He can be seen in the video sidestepping away from someone (presumably, Velasco), as he reaches into his pocket for his knife; he appears to handle the knife with both

hands—apparently to open or unfold it—then lets his knife-holding hand rest at his side as he squares up to face his victim, allowing for a quicker and more forceful strike. He paused long enough to say a few words (or so it appears from the soundless video) before lunging at Velasco. He stabbed Velasco in the neck, cutting his carotid artery and jugular vein with enough force to penetrate more than two inches deep, suggesting that he intended to inflict a deadly wound. Defendant's attack also coincided with the train's arrival in a station and the opening of the car's doors, which allowed him to escape. From these circumstances, the jury could reasonably infer that defendant considered whether to kill the man who happened to stand up in the aisle near him and reflected upon the decision before stabbing him to death. The evidence is therefore sufficient to support the jury's finding of premeditation and deliberation.

B. *Instructional Issues*

Defendant contends that the court erred by failing to instruct the jury as to unreasonable self-defense and subjective provocation. We reject these arguments.

The trial court is obligated to instruct the jury regarding any defense supported by substantial evidence. (*People v. Watson* (2000) 22 Cal.4th 220, 222.) In a murder case, the court also has the duty to instruct on every theory of the lesser included offense of voluntary manslaughter that has substantial evidentiary support. (*People v. Breverman* (1998) 19 Cal.4th 142, 149, 160.) Substantial evidence in this context is evidence sufficient to deserve consideration by the jury; that is, evidence that a reasonable jury could find persuasive. (*People v. Valdez* (2004) 32 Cal.4th 73, 116.)

One who intentionally and unlawfully kills with an unreasonable but good faith belief in the need to defend himself from imminent peril to life or great bodily injury is guilty of

voluntary manslaughter, not murder. (*People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Blakeley* (2000) 23 Cal.4th 82, 87–88; *People v. Flannel* (1979) 25 Cal.3d 668, 674.) One who commits murder in response to provocation may act without premeditation and deliberation and, therefore, not be guilty of first degree murder. (*People v. Ward* (2005) 36 Cal.4th 186, 214–215; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) The provocation must evoke an emotional reaction in the defendant sufficient to negate premeditation and deliberation. (*People v. Ward*, *supra*, 36 Cal.4th at p. 215.)

Here, there is no substantial evidence to support a finding that defendant held a good faith belief in the need to defend himself or that anyone had provoked him to attack. Although Velasco appears to have stood up from his seat when defendant was nearby, there is no evidence that he said or did anything to provoke defendant or to evoke in him a good faith belief in the need to defend himself. Velasco was unarmed and his empty hands remained at his side. There is no evidence that Velasco said anything to defendant. Even if Velasco spoke the words, "What? What? What?" which Herring heard someone say, they are not words of provocation.

Defendant repeatedly asserts that Herring testified that Velasco was "posturing" at or toward defendant, which arguably suggests a provocative movement by Velasco. This characterization of Herring's testimony, however, is misleading. On cross-examination, defense counsel asked Herring: "At some point do you see Mr. Velasco posture towards the defendant?" Herring answered, "Yes." Defense counsel then asked, "What do you mean by posturing?" Herring answered, "Well, it's kind of two men sort of sizing each other up a little bit like." Herring's affirmation of counsel's choice of the word "posturing," therefore, does not suggest any movement by Velasco other than, perhaps,

the movement of his eyes as he sized up defendant. Such sizing up, we conclude, does not support an instruction on either unreasonable self-defense or provocation. There was therefore no error in failing to give either instruction.

Defendant points out that the video of the incident shows him backing away from Velasco, which he contends implies that Velasco did something to cause him to back away. He asserts that Velasco was larger and older than he (although the record does not reveal these facts). In the absence of evidence as to why Velasco stood up, he suggests that he did so because defendant "was black, young, or 'rapping,' or all three." He also contends that the reason why witnesses did not hear Velasco say something may have been because the train was loud and crowded. These arguments, however, are entirely speculative and do not constitute substantial evidence to warrant instructions on unreasonable self-defense or provocation.[2]

C. *Defense Counsel's Failure to Object to Photographs*

After the prosecution showed to the jury a video recording of the incident, the prosecutor introduced seven still photographs reproduced from the video recording. The photographs show defendant in various positions he took in the seconds before the

---

[2] The Attorney General argues that the instruction on provocation need not be given unless requested, and defendant's failure to request the instruction forfeits the argument on appeal. Defendant argues that he did not forfeit the argument and, if he did, his counsel was thereby constitutionally deficient. Because we conclude that the evidence was insufficient to support the instruction even if defense counsel had requested it, we do not reach these issues.

stabbing. The prosecution also elicited testimony from Detective Retzlaff describing the images depicted in the photographs.

Defendant argues that his trial counsel should have objected to the photographs and Retzlaff's testimony about them as irrelevant and inadmissible under Evidence Code section 352.[3] In particular, defendant argues that the use of the still photographs distorted the jurors' "impression of the speed of the unfolding events as they actually occurred" and were thus "highly misleading on the critical disputed issue" of premeditation and deliberation. For this point he relies on *Powell v. Industrial Commission* (Ariz.Ct.App. 1966) 418 P.2d 602 (*Powell*), vacated (Ariz. 1967) 432 P.2d 348, which held that a film that had been speeded up such that it did not accurately depict a disability claimant's movements should have been excluded. (*Id.* at p. 610.)

Counsel's failure to object to the still photographs and related testimony, defendant contends, deprived him of his right to the effective assistance of counsel. We disagree.

A defendant claiming ineffective assistance of counsel must establish both that his attorney's representation fell below an objective standard of reasonableness and prejudice resulting therefrom. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693–694; *People v. Pettie* (2017) 16 Cal.App.5th 23, 80.) Generally, trial counsel's failure to object is considered a trial tactic that the reviewing court will not second guess. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) If, as here, the record does not show why counsel failed to object, the claim of ineffective assistance of counsel

---

[3] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

must be rejected unless there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, defense counsel may have decided not to object to the photographs because any objection would probably have been overruled and counsel did not want his objection to focus the jury's attention on the evidence. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1290; *People v. Huggins* (2006) 38 Cal.4th 175, 206.) Indeed, an objection should have been overruled because the photographs were relevant to the issues of intent, premeditation, and deliberation and their probative value was not substantially outweighed by any of the reasons identified in Evidence Code section 352. Unlike the speeded up film in *Powell*, *supra*, 418 P.2d at page 610, the still photographs were an accurate depiction of what they portrayed: the defendant at one instant in time. The duration and speed of the attack is shown by the video of the incident, and there is no reason to believe that the still photographs confused the jurors on that point.

D. *Faretta* Motion

Defendant contends that the court erred in denying his request to represent himself. The following additional facts are relevant to that issue.

On January 21, 2015, defendant was arraigned and counsel was appointed to him. On May 5, 2015, the court granted his motion to represent himself and appointed Seymour Amster as his "standby counsel."

On June 14, 2016, the court granted defendant's request to appoint Amster as his counsel of record.

On October 14, 2016, the court set the matter for trial to begin on November 1, 2016. The case thereafter trailed until November 3, 2016, when it was continued to January 9, 2017 as

"day 06 of 10." On January 9, 2017, the case trailed to the next day on Amster's request.

On January 10, 2017, the case was called for trial as day "seven of ten." At that time, Amster informed the court that defendant "wanted to go pro[.] per." Amster also said that he "would like to declare a doubt" as to defendant's competency to stand for trial. "There have been mental issues," he explained, and defendant "is rambling [and] not listening to instructions." Amster also pointed out that defendant was, at that moment, "laughing [and] not acting in a proper manner."

Regarding trial readiness, Amster stated: "I would like more time, but it is the court's decision on that. I did prepare. I don't think I will get a time waiver. I can do a competent job in doing the trial." At that point, the following colloquy took place:

"The defendant: I am going to sue all you guys.

"The court: You don't need to say anything.

"[Defense counsel]: I am instructing [defendant] not to speak and to follow the court's rules. He is not following the court rules.

"The defendant: Make sure the media.

"The court: There is no need for you to say anything. Your request for pro[.] per[.] status is denied. You were granted.

"The defendant: I have the right to represent myself, and when I was pro[.] per[.], you told me that I should consider an attorney because they have more experience, but Mr. Amster has done nothing in my case. Mr. Amster, how many motions did you file? How many experts have you hired on this case?

"[¶] . . . [¶]

"The defendant: I will make sure the media hears about this.

"[Defense counsel]: Your Honor, I cannot represent this man trying to speak like . . . [t]his without my representation.

"The court: What will happen, Mr. Amster, wherever he goes for the trial, he can sit in the lockup and listen to it as the trial

progresses if he can't control himself. All right. People ready in this matter?

"[The prosecutor]: Yes.

"The court: All right.

"The defendant: I object to the fact that I have the right to represent myself. And that is my right."

The court and counsel then discussed the number of anticipated witnesses, the time estimates for trial, and the status of settlement discussions.

The defendant interjected: "I would like to have the D.A.'s name." The court then addressed defendant: "I want to make a comment on your request to represent yourself. The court previously granted that privilege to you. You gave up that privilege. Mr. Amster [*sic*] within three dates of trial, and it is not a timely request nor would it be appropriate. Your conduct this morning before the court indicates further that because of your actions and manner that you are not capable of representing yourself properly before the court." The court then addressed the doubt counsel raised about defendant's competency, and concluded that "he is competent." The trial began the next day.

A criminal defendant has a right under the Sixth Amendment to the United States Constitution to represent himself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 835; *People v. Williams* (2013) 58 Cal.4th 197, 252.) A trial court must grant a defendant's request for self-representation—a so-called *Faretta* motion—"if the defendant knowingly and intelligently makes an unequivocal and timely request after having been apprised of its dangers." (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 97–98.) The timeliness requirement "serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice." (*People v. Horton* (1995) 11 Cal.4th 1068, 1110; see *People v. Windham* (1977) 19 Cal.3d 121, 129, fn. 5.)

A *Faretta* motion is untimely when it is made on the "eve of trial." (See *People v. Lynch* (2010) 50 Cal.4th 693, 722.) Thus, courts have held that motions were untimely when made two days before the scheduled trial date (*People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1390), six days before a scheduled trial date (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 790–791), "within days prior to trial" (*People v. Rudd* (1998) 63 Cal.App.4th 620, 626), on the date scheduled for trial (*People v. Horton*, *supra*, 11 Cal.4th at p. 1110), and prior to the case being transferred to the master calendaring department for trial (*People v. Clark* (1992) 3 Cal.4th 41, 99–100). Although the fact that a defendant requests a continuance in conjunction with the motion to self-represent is a factor in determining timeliness, a request can be deemed untimely even when no continuance is requested and the defendant states he is ready to proceed. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 426; *People v. Rudd*, *supra*, 63 Cal.App.4th at p. 626.)

Here, defendant's request to represent himself was made after the trial was scheduled to begin and on the seventh day of the 10-day period within which trial must begin in the absence of a waiver. (See § 1382, subd. (a)(2)(B).) Both sides announced they were ready, and the trial began the next day. Although the record does not indicate that defendant would have requested a continuance of the trial in connection with his request to represent himself, based on his conduct in court that day and counsel's representations about his uncooperative behavior, the court could have reasonably concluded that defendant's self-representation would "obstruct the orderly administration of justice." (*People v. Horton*, *supra*, 11 Cal.4th at p. 1110.) Under the authorities noted above, the request was made on the "eve of trial" and, therefore, untimely.

Defendant points out that "the trial court originally said nothing about the request being untimely." Instead, the court initially stated only the incomplete sentence: "You were granted." When read in the context of the court's subsequent statements, it appears the court was referring to its grant of defendant's first *Faretta* motion. Even if, as defendant contends, this is an insufficient reason by itself to deny the motion, the court clarified that it found the motion was "not a timely request." Moreover, as our Supreme Court has stated, courts will uphold the trial court's ruling even when "the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds." (*People v. Dent* (2003) 30 Cal.4th 213, 218.) Here, the motion was properly denied as untimely even if the court's initial reason was insufficient.

When, as here, a *Faretta* motion is not made in a timely fashion prior to trial and self-representation is therefore no longer a matter of right, the court still has discretion to permit such representation. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) The court is not required to state its reasons on the record for denying a discretionary motion for self-representation. (*People v. Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) Nevertheless, the court stated that, based on defendant's conduct in court that day, defendant was "not capable of representing [him]self properly before the court."

Defendant contends that the court misinterpreted defendant's misbehavior in court. He asserts that the court should have viewed his conduct as "an outburst derived from frustration with his appointed counsel, with whom he expressed having a conflict, and his desire to speak for himself and not through counsel." Nor, defendant contends, could the court reasonably believe that defendant's disruptive behavior would continue. The court, however, was in a much better position than we are to evaluate

defendant's conduct and the likelihood that it would continue. Even if we agreed with defendant's views about his conduct that day, he has failed to establish that the court's decision was an abuse of its discretion.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.